

ACT 44
Relating to Family Leave
Effective July 1, 2003

SECTION 1. The legislature finds that existing law does not require an employer to permit an employee to use sick leave to attend to the illness of a child, parent, spouse, or reciprocal beneficiary.

The purpose of this Act is to require an employer who provides sick leave for employees, including the State and its political subdivisions, to permit employees to use any accrued and available sick leave above the amount required under the temporary disability insurance law for family leave purposes.

The legislature intends that this Act not be construed to:

- (1) Allow an employer to deny an employee the right to use sick leave, discharge, or threaten to discharge, demote, suspend, or in any manner discriminate against an employee for exercising the employee's right to use sick leave to attend to a child, parent, spouse, or reciprocal beneficiary with a serious health condition; nor
- (2) Require an employer, including the State, any of its political subdivisions, and any instrumentality of the State or its political subdivisions, to diminish an employee's accrued and available sick leave below the amount required under the temporary disability insurance law.

SECTION 2. Section 398-1, Hawaii Revised Statutes, is amended as follows:

1. By adding the definition of "sick leave" to read:

"Sick leave" means accrued increments of compensated leave provided by an employer to an employee for use by the employee for any of the following reasons:

- (1) The employee is physically or mentally unable to perform the employee's duties due to illness, injury, or a medical condition of the employee;
- (2) The absence is for the purpose of obtaining professional diagnosis or treatment for a medical condition of the employee; or
- (3) The absence is for other medical reasons of the employee, such as pregnancy or obtaining a physical examination.

"Sick leave" shall not include any benefit provided under an employee welfare benefit plan subject to the federal Employee Retirement Income Security Act of 1974 and shall not include any insurance benefit, workers' compensation benefit, unemployment compensation disability benefit, temporary disability insurance benefit, or benefit not payable from the employer."

2. By amending the definition of "employer" to read:

"Employer" means any individual or organization, including the State, any of its political subdivisions, any instrumentality of the State or its political subdivisions, any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or receiver or trustee in bankruptcy, or the legal representative of a deceased person, who employs one hundred or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year."

SECTION 3. Section 398-4, Hawaii Revised Statutes, is amended to read as follows:

"§398-4 Unpaid leave permitted; relationship to paid leave~~[-]; sick leave.~~

(a) Pursuant to section 398-3, an employee shall be entitled to four weeks of family leave. The family leave shall consist of unpaid leave, paid leave, or a combination of paid and unpaid leave. If an employer provides paid family leave for fewer than four weeks, the additional period of leave added to attain the four-week total may be unpaid.

(b) ~~[An] Except as otherwise provided in subsection (c), an employee or employer may elect to substitute any of the employee's accrued paid leaves [such as sick-], including but not limited to vacation, personal, or family leave for any part of the four-week period in subsection (a) [; provided that an employer or employee may not substitute an employee's accrued sick leave in any situation under this chapter unless:~~

~~(1) Sick leave is normally granted for such purposes by an employer's policy or practice; or~~

~~(2) Upon mutual agreement by the employer and the employee].~~

(c) An employer who provides sick leave for employees shall permit an employee to use the employee's accrued and available sick leave for purposes of this chapter; provided that an employee shall not use more than ten days per year for this purpose unless an express provision of a valid collective bargaining agreement authorizes the use of more than ten days of sick leave for family leave purposes. Nothing in this section shall require an employer to diminish an employee's accrued and available sick leave below the amount required pursuant to section 392-41."

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2003.

Permitted to become law without the
Governor's signature April 30, 2003

Hawaii Revised Statutes

CHAPTER 398 FAMILY LEAVE

PART I. GENERAL PROVISIONS

SECTION

- 398-1 DEFINITIONS
- 398-2 INAPPLICABILITY
- 398-3 FAMILY LEAVE REQUIREMENT
- 398-4 UNPAID LEAVE PERMITTED; RELATIONSHIP TO PAID LEAVE
- 398-5 NOTICE
- 398-6 CERTIFICATION
- 398-7 EMPLOYMENT AND BENEFITS PROTECTION
- 398-8 PROHIBITED ACTS
- 398-9 ADMINISTRATION
- 398-10 APPLICABILITY
- 389-11 RULES

PART II. ENFORCEMENT

- 398-21 FILING OF COMPLAINT
- 398-22 PREDETERMINATION SETTLEMENT
- 398-23 INVESTIGATION AND CONCILIATION
- 398-24 APPEAL AND HEARING
- 398-25 CIVIL ACTION
- 398-26 REMEDIES
- 398-27 NOTICE OF RIGHT TO SUE AND EMPLOYEE REMEDIES
- 398-28 COMPLIANCE REVIEW
- 398-29 PENALTY

Note

Chapter not applicable to private sector until July 1, 1994. L 1993, c 152, ' 2.

Cross References

Leave sharing program, see ' 79-33.

PART I. GENERAL PROVISIONS

Note

Sections 398-1 to 398-11 designated as part I by L 1995, c 154, ' 2.

' 398-1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Child" means an individual who is a biological, adopted, or foster son or daughter; a stepchild; or a legal ward of an employee.

"Department" means the department of labor and industrial relations.

"Director" means the director of labor and industrial relations.

' 398-1

"Employee" means a person who performs services for hire for not fewer than six consecutive months for the employer from whom benefits are sought under this chapter.

"Employer" [*Definition effective July 1, 2002.*] means any individual or organization, any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or receiver or trustee in bankruptcy, or the legal representative of a deceased person, who employs one hundred or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.

"Employment" or "employed" means service, including service in interstate commerce, performed for wages under any contract of hire, written or oral, express or implied, with an employer.

"Employment benefits" means all benefits (other than salary or wages) provided or made available to employees by an employer, and includes group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether the benefits are provided by a policy or practice of an employer or by an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)).

"Health care provider" means a physician as defined under section 386-1.

"Parent" means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, a grandparent, or a grandparent-in-law.

"Serious health condition" means a physical or mental condition that warrants the participation of the employee to provide care during the period of treatment or supervision by a health care provider, and:

- (1) Involves inpatient care in a hospital, hospice, or residential health care facility; or
- (2) Requires continuing treatment or continuing supervision by a health care provider. [L 1991, c 328, pt of ' 1; am L 1995, c 154, ' 4; am L 2000, c 253, ' 130]

' 398-2 Inapplicability. The rights provided under this chapter shall not apply to employees of an employer with fewer than one hundred employees. [L 1991, c 328, pt of ' 1]

' 398-3 Family leave requirement. (a) An employee shall be entitled to a total of four weeks of family leave during any calendar year upon the birth of a child of the employee or the adoption of a child, or to care for the employee's child, spouse or reciprocal beneficiary, or parent with a serious health condition.

(b) During each calendar year, the leave may be taken intermittently.

(c) Leave shall not be cumulative.

(d) If unpaid leave under this chapter conflicts with the unreduced compensation requirement for exempt employees under the federal Fair Labor Standards Act, an employer may require the employee to make up the leave within the same pay period.

(e) Nothing in this chapter shall entitle an employee to more than a total of four weeks of leave in any twelve-month period. [L 1991, c 328, pt of ' 1; am L 1992, c 87, ' 6; am L 1997, c 383, ' 57]

Cross References

Public employees; family leave, see ' 79-32.

' 398-4 Unpaid leave permitted; relationship to paid leave. (a) Pursuant to section 398-3, an employee shall be entitled to four weeks of family leave. The family leave shall consist of unpaid leave, paid leave, or a combination of paid and unpaid leave. If an employer provides paid family leave for fewer than four weeks, the additional period of leave added to attain the four-week total may be unpaid.

(b) An employee or employer may elect to substitute any of the employee's accrued paid leaves such as sick, vacation, personal, or family leave for any part of the four-week period in subsection (a); provided that an employer or employee may not substitute an employee's accrued sick leave in any situation under this chapter unless:

- (1) Sick leave is normally granted for such purposes by an employer's policy or practice; or
- (2) Upon mutual agreement by the employer and the employee. [L 1991, c 328, pt of ' 1; am L 1995, c 154, ' 5]

' 398-5 Notice. In any case in which the necessity for family leave is foreseeable, the employee shall provide the employer with prior notice of the expected birth or adoption or serious health condition in a manner that is reasonable and practicable. [L 1991, c 328, pt of ' 1]

' 398-6 Certification. (a) An employer may require that a claim for family leave be supported by written certification.

(b) For the birth of a child, certification shall be issued by a health care provider or the family court. For the placement of a child for adoption with the employee, certification shall be issued by a recognized adoption agency, the attorney handling the adoption, or by the individual officially designated by the birth parent to select and approve the adoptive family.

(c) When leave is to care for a child, spouse, or parent who has a serious health condition, certification shall be issued by the health care provider of the individual requiring care. Certification shall be considered sufficient if it provides information as required by the director. [L 1991, c 328, pt of ' 1; am L 1995, c 154, ' 6]

' 398-7 Employment and benefits protection. (a) Upon return from family leave, the employee shall be entitled to be restored by the employer to the position of employment held by the employee when the leave commenced, or restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. If, however, during a leave, the employer experiences a layoff or workforce reduction and the employee would have lost a position had the employee not been on family leave, the employee is not entitled to reinstatement in the former or equivalent position. In such circumstances, the employee retains all rights, including seniority rights, pursuant to the good faith operation of a bona fide layoff and recall system.

(b) The taking of family leave shall not result in the loss of any employment benefit accrued before the date on which the leave commenced, except for any paid leave that may have been expended in conjunction with the family leave.

(c) Nothing in this chapter shall be construed to entitle or deny any employee to the accrual of any seniority or employment benefits during any period of leave, or any right, employment benefit, or position to which the employee would have been entitled had the employee not taken the leave. [L 1991, c 328, pt of ' 1]

' 398-8 Prohibited acts. (a) It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this chapter.

(b) It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this chapter.

(c) It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because the individual has:

- (1) Filed any charge, or instituted or caused to be instituted any proceeding, under or related to this chapter;
- (2) Given or is about to give any information in connection with any inquiry or proceeding relating to any right provided under this chapter; or

' 398-8

- (3) Testified or is about to testify in any inquiry or proceeding relating to any right provided under this chapter. [L 1991, c 328, pt of ' 1]

' 398-9 Administration. (a) The director shall have jurisdiction over those prohibited acts made unlawful by this chapter.

(b) The department shall assist employers in the placement of temporary help to perform the work of those employees on family leave.

(c) The director also may hire, subject to chapters 76 and 77, investigators, hearings officers, clerical, stenographic, and other staff as may be necessary to administer and enforce this chapter. [L 1991, c 328, pt of ' 1; am L 1995, c 154, ' 7]

' 398-10 Applicability. (a) Section 398-3 shall set a minimum standard that is not intended to replace family leave policies that exist as of the effective date of this Act and that provide for equal or greater employment benefits than those benefits afforded under this chapter.

(b) Nothing in this chapter shall be construed to modify, eliminate, or otherwise abrogate any existing family leave policies, employment benefits, or protections that employees may have pursuant to any employment contracts or collective bargaining agreements, to the extent that the contracts and agreements provide greater protections than those afforded under this chapter.

(c) To the extent the provisions of this chapter contradict or otherwise conflict with any contract rights or collective bargaining agreements in existence as of the date of this Act, the provisions that provide greater benefits to the employees shall control. [L 1991, c 328, pt of ' 1]

' 398-11 Rules. Subject to chapter 91, the director may adopt rules necessary for the enforcement and administration of this chapter. The rules shall have the force and effect of law. [L 1993, c 152, ' 1]

Note

Effective July 2, 2002, Achapter 76 and 77" changed to Achapter 76". L 2000, c 253, ' 150.

[PART II.] ENFORCEMENT

[' 398-21] Filing of complaint. (a) Any individual claiming to be aggrieved by an alleged unlawful act may file with the department a verified complaint in writing.

(b) The attorney general or the department, in like manner, may file a complaint on behalf of an individual.

(c) A complaint may be filed on behalf of a class by the attorney general or the department.

(d) No complaint shall be filed after the expiration of ninety days after the:

(1) Date of the alleged unlawful act; or

(2) Date of discovery by the employee of the alleged unlawful act; however, in no event shall such a complaint be filed after the expiration of one hundred eighty days of the alleged unlawful act.

(e) After the filing of any complaint, the attorney general or the department, as applicable, shall serve a copy of the complaint upon the employer. [L 1995, c 154, pt of ' 3]

[' 398-22] Predetermination settlement. At any time after the filing of a complaint, but prior to a determination by the department that this chapter has been violated, the parties may agree to resolve the complaint through a predetermination settlement. [L 1995, c 154, pt of ' 3]

[' 398-23] Investigation and conciliation. (a) The department may investigate and conciliate any complaint filed under this chapter.

(b) Every employer shall furnish or provide to the department access to records, documents, and other material to determine compliance with this chapter. The department shall have the right to examine, photograph, or copy the material and interview witnesses at the place of employment or business during regular working hours with respect to any matter under this chapter.

(c) The department may require by subpoena the attendance and testimony of witnesses and the production of all records, payrolls, correspondence, documents, and other material relative to any matter under investigation.

(d) If the department determines after investigation that this chapter has been violated, the department shall inform the employer and endeavor to remedy the violation by informal methods, such as conference or conciliation.

(e) If the department finds that methods in subsection (d) will not resolve the complaint, the department shall issue an order and a demand for compliance.

(f) If the department issues an order that finds that an employer has violated the requirements of this chapter, the department may prescribe relief as provided under this chapter. [L 1995, c 154, pt of ' 3]

[' 398-24] Appeal and hearing. *[Section effective July 1, 1996.]* (a) Upon appeal by the employer, the order issued by the department shall be subject to a de novo review by a hearings officer appointed by the director.

(b) The hearings officer shall schedule a contested case hearing that shall be heard in accordance with chapter 91.

(c) At any time after the filing of an appeal under subsection (a), but prior to the hearing, the hearings officer may hold a prehearing conference with the parties or their representatives.

(d) If a hearing is held as provided under subsection (b), the hearings officer shall issue a decision and grant relief as provided under this chapter.

(e) Any person aggrieved by the decision of the hearings officer shall be entitled to judicial review as provided by section 91-14.

(f) The hearings officer may administer oaths, take or cause to be taken depositions of witnesses, and may issue subpoenas to compel the attendance and testimony of witnesses or the production of records, payrolls, correspondence, documents, or other material relating to any matter to be heard. [L 1995, c 154, pt of ' 3]

[' 398-25] Civil action. (a) If an employer fails or neglects to comply with the:

- (1) Final order of the department from which no appeal has been taken as provided by this chapter; or
- (2) Final decision of the hearings officer,

the department or the affected employee may apply to any court of competent jurisdiction to enforce the provisions of the final order or decision and for any other appropriate relief. In any proceeding to enforce the provisions of the final order or decision, the department or the affected employee need only file with the court proof that a certified copy of the final order or decision was served. In the case of the final decision, proof that the notice of hearing was given also must be filed with the court.

(b) Any action to enforce this chapter, or to recover damages or equitable relief prescribed by this chapter, may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of the employee or employees, or the employee or employees may designate an agent or representative to maintain the action.

' 398-25

(c) In any action brought under this chapter, the court shall allow, in addition to any judgment awarded to the plaintiff, costs of action, including fees of any nature, and reasonable attorney's fees, to be paid by the defendant. [L 1995, c 154, pt of ' 3]

[' 398-26] Remedies. (a) In addition to all employment terms and benefits provided under section 398-7, remedies prescribed and ordered by the department or the court under this chapter may include any legal, equitable, and other relief the department or court deems appropriate.

(b) Relief under this section may include:

- (1) The amount of any wages, salary, employment benefits, or other compensation denied or lost to the employee by reason of the violation; or
- (2) In a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to four weeks of wages or salary for the employee.

(c) An employer may be liable for an additional amount as liquidated damages equal to the sum of the applicable amount in subsection (b)(1) or (2); provided that if an employer who has violated this chapter proves to the satisfaction of the department or the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter, the department or the court may reduce the amount of the liability to the applicable amount determined under subsection (b)(1) or (2). [L 1995, c 154, pt of ' 3]

[' 398-27] Notice of right to sue and employee remedies. (a) The department may issue a notice of right to sue. Within ninety days after the receipt of a notice of right to sue, the complainant may bring a civil action under this chapter. The department may intervene in a civil action brought pursuant to this chapter if the case is of general importance.

(b) An action by an employee to enforce the provisions of this chapter may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of oneself or themselves, or the employee or employees may designate an agent or representative to maintain the action.

(c) The court in any action brought under this section, in addition to any judgment awarded to the plaintiff or plaintiffs, shall allow costs of action, including costs of fees of any nature, and reasonable attorney's fees, to be paid by the defendant.

(d) The court also may provide injunctive relief in appropriate circumstances. [L 1995, c 154, pt of ' 3]

[' 398-28] Compliance review. The department may investigate whether the terms of an agreement, settlement, order, or decision are being complied with by the employer. If the employer is not in compliance, the department shall take appropriate action as provided under this chapter. [L 1995, c 154, pt of ' 3]

[' 398-29] Penalty. Any employer who intentionally resists, prevents, impedes, or interferes with the department in the performance of duties pursuant to this chapter, or who in any manner intentionally violates this chapter, shall be guilty of a petty misdemeanor. [L 1995, c 154, pt of ' 3]